IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 3560 OF 2007

Rajesh @ Foujan Vijaykumar
Gup @ Samaydit Choudhary .... Applicant

versus

State of Maharashtra ..... Respondent.

Ms. Sadiya Farooqui i/b. Mr.Zia -ui-Mustafa for the applicant.
Mrs. M.H.Mhatre APP for State.

CORAM; A.P. DESHPANDE, J.
DATED; 17TH DECEMBER, 2007

P.C.;

1. Heard. The applicants are facing the prosecution and charge has been framed originally against accused persons under section 394 of Inian Penal Code. After examining two witness i.e. P.w.1 and P.w.2, the APP moved an application for alteration of charge from 394 to 397 of IPC. After alteration of the charge from section 394 to section 397 IPC, five witnesses have been examined and cross examined. Belatedly, the accused/applicant moved an application purportedly under section 216(4) of Cr.P.C. for conducting new trial and for examination of the witnesses afresh. The said application has been rejected by the trial court and aggreived thereby the present application has been filed.

2. The Court below has held that there is no reason to hold a new trial. The learned counsel for the applicant has submitted that on account of alteration of charge, the accused/applicants would be put to suffer prejudice as P.w.1 and 2 have not being cross examined, having regard to the ingredience of offence under section 397. Offence under section 397 is an aggravated form of offence under section 394. True it is that on account of alteration of charge the applicant/accused would be entitled to recall of the witnesses so that they can be further cross examined touching the ingredients of section 397 of IPC. If the two witnesses are not recalled for further corss examination, there is likelihood of occurence of miscarriage of justice on account of denial of an opportunity to the applicant/accused. As the two witnesses were earlier cross examined at the touch stone of section 394 of IPC, the learned A.P.P. in all fairness does not oppose the limited prayer made by the applicant for recalling of P.ws.1 and 2, having regard to the ingredients of section 397. Hence I decline to interfere with the impugned order passed below Exh.30. However, I direct the Additional Sessions Judge, Sewri to recall P.ws. 1 and 2 for further cross examination by the accused touching the ingredients of section 397 of IPC. Application is

disposed of. Rule made absolute in the above terms.

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